OREGON
PUBLIC CONTRACTING COALITION

DESIGN-BUILD WHITEPAPER

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Special thanks are extended to the members of the Design-Build Task Force who spent innumerable hours working together drafting this document and without whom it would not exist:

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I. INTRODUCTION

The Public Contracting Coalition consists of a diverse group of individuals representing public agencies, contractors, design professionals, and construction managers. A list of the participating organizations is included in this paper as Attachment 4. The purpose of the Coalition is to discuss best practices of public improvement procurement in the State of Oregon. In April 1997, the Coalition issued a White Paper related to the Construction Manager/General Contractor (CM/GC) procurement method. In January 2000, the Coalition assembled a subcommittee of members who met over a period of several months to discuss the Design-Build method of public procurement. This white paper is the result of that work.

While the Design-Bid-Build or "low bid" method can, and often does, offer a good way to procure and deliver public improvements, increasingly, public agencies have been looking for alternative contracting methods for projects with special circumstances or conditions that make Design-Bid-Build less desirable. These circumstances have usually included limited time requiring fast-tracking, unusual technical complexity where special knowledge or skill is required, complexity caused by remodeling occupied space which requires a high level of contractor coordination, or projects which have been unsuccessfully bid. The most common forms of alternative contracting are Construction Manager/General Contractor and Design-Build.

Design-Build, an increasingly popular procurement method, allows the agency a single contract with a private firm for both design and construction services. There have been numerous Design-Build projects undertaken in Oregon over the past 10 years. Some of the most notable are:

Project	Year Completed	Location	Agency
Public Services Building	1990	Hillsboro	Washington County
State Office Building	1992	Portland	State of Oregon
Metro Regional Headquarters	1993	Portland	Metro
Pearl Street Parking Structure	1996	Eugene	City of Eugene
Citizens Bldg. Parking Structure	1996	Eugene	City of Eugene
Gresham Park and Ride	1996	Gresham	Tri-Met
Sunset Transit Center	1997	Beaverton	Tri-Met
Willamette River Bridge Re-deck	1998-1999	Harrisburg	ODOT
1-5 Evans Creek to Rock Point Surface Preservation	1999	Grants Pass	ODOT
Hillsboro Stadium	1999	Hillsboro	City of Hillsboro

The purpose of this document is to provide guidelines to public agencies that elect to use the Design-Build method of contracting. The members of the Coalition did not intend to cover each and every aspect of Design-Build public improvement contracts. Instead, the white paper addresses the most significant factors that should be considered in the original decision to utilize the Design-Build method as well as the recommended means of selecting a Design-Builder and some unique contract considerations. The white paper does provide contact information to a variety of additional resource material for agency use as Attachment 1.

II. DEFINITION OF DESIGN-BUILD

Generally, public agencies use three primary methods for procuring services for public improvements. Design-Bid-Build is the most common of the three and the one generally prescribed by law. The other two methods, known as CM/GC and Design-Build, are alternative contracting methods that may be utilized only if an exemption from competitive bidding is in place. These three methods are more fully described below.

A. DESIGN-BID-BUILD

The Design-Bid-Build process is the traditional approach to delivering public improvement projects. Typically, the agency selects a design professional and works with the design consultant team to develop plans and specifications for constructing the project. While the design professional usually will either employ an independent cost estimator or prepare their own cost estimates, the actual cost of the project is solely determined by contractors during a competitive bidding process. Once the lowest responsive and responsible bidder is established and the agency has determined that sufficient funding exists, the contract is awarded. The contractor then proceeds to construct the Public Improvement according to the plans and specifications.

B. CONSTRUCTION MANAGER/GENERAL CONTRACTOR

Construction Manager/General Contractor (CM/GC) is an alternative contracting method in which a single firm is selected during the early phases of the design process by a competitive selection process. This selection process involves consideration of other factors in addition to price in determining the successful firm. The selected firm, known as the CM/GC, then has the opportunity to work with the agency and design professional during the design process to provide value engineering, constructability review, scheduling, estimating, and other related services. Once the design has progressed to a suitable extent, contract documents for portions of the project can be prepared and construction can commence before all design services are complete. This process is known as fast-track construction. As a part of the process, the CM/GC typically provides a Guaranteed Maximum Price or GMP for the agency's acceptance. The CM/GC then usually competitively procures from sub-contractors and proceeds with the work. Compensation for CM/GC services is often based on a combination of a fee and a not-to-exceed amount for services to manage and construct the Public Improvement.

C. DESIGN-BUILD

Design-Build is an alternative contracting method used for delivery of both the design and construction services under one contract. This makes the Design-Builder the single point of responsibility. Many variations of the approach exist, but all have “single point of responsibility” as a common element. Design-Build can be undertaken when a performance specification is developed and the entire package of design and construction services is competitively bid. More commonly, the Design-Builder is selected based on a combination of qualifications, technical approach and price. Occasionally, the selection is made primarily on the basis of a design competition. By combining these services, the opportunity exists to totally integrate the work of the contractor and the design consultant. This allows the selected firm to work with the agency during the design process to provide design, value engineering, constructability review, scheduling, estimating, and other related services. It also means that construction could start before the design is totally completed. Compensation for Design-Build is typically a fixed price or a GMP similar to the CM/GC process, however many variations exist.

Figure 1 (which follows) briefly summarizes how different project characteristics may fit with these approaches. Note that the most typical variation of each method was utilized in this comparison.

FIGURE 1--COMPARISON OF CONTRACTING METHODS

PROJECT CHARACTERISTICS	*DESIGN-BID-BUILD* *TRADITIONAL*	*CM/GC* *ALTERNATIVE*	*DESIGN-BUILD* *ALTERNATIVE*
Complexity	Moderate to low	Probably high—may have multiple bid packages	May be driving factor -usually either high or low, but not in-between
Schedule	Reasonable—not a key factor	Aggressive – fast-tracking possible	Aggressive – fast-tracking possible
Budget	Normal importance	High priority, likely fixed, usually GMP	Likely fixed
Program resolution	Well resolved	Not a driving factor	Not a driving factor
Design quality	Not a driving factor	Complexity may drive higher quality	Not a driving factor
Construction quality	Not a driving factor	Complexity implies higher quality	Not a driving factor
CONTRACTUAL STRUCTURE			
Compensation	Lump sum—all participants	Standard fees to design team, GMP to CM/GC	Lump sum to consolidated team
Contract arrangement	Agency–Design professional Agency–Contractor	AIA contract form or variant for design; bid or negotiate for construction	Single–point contract with Design-Builder
DELIVERY TEAM STRUCTURE			
Disciplines required	Typical project design & construction teams	Standard design team plus CM/GC	Contracting and design consolidated
Experience needed	Moderate	Complex project→ High degree of experience for all participants	Experience in D/B needed
Communications	Traditional design professional–as–agent	Design professional as agent; CM is contractor– "open book"	Consolidated
LEGAL/RISK MANAGEMENT			
Liability	Standard	CM/GC "at risk" but design team further exposed	Single point of response with Design-Build
Dispute resolution	Typical ADR, mediation litigation	Standard but in partnering atmosphere	Typical ADR, mediation litigation
Conflict of interest	None	Potential to CM/GC due to dual roles during pre-construction and construction phase	Potential professional conflict for Design Team
PROJECT CONTROL			
Schedule control	By Contractor	By CMGC	The Agency will look to DB Team leadership for guidance. How responsibilities within DB Team distributed is internal issue
Cost control	Contractor/Design professional	By CMGC with Design Team consultation	Design-Builder
Quality control	Design professional/Contractor	By CMGC with Design Team consultation	Design-Builder
Agency staff	Standard	Must be able to meet Public Agencies' obligations in pre-construction services and contract administration	Depends upon degree of Agency control over the design and construction

III. WHEN TO USE DESIGN-BUILD

The decision to use Design-Build involves two separate but related determinations one of which is policy related and one of which is legal. Those steps are described in the following.

A. INITIAL PROJECT STAFF DECISION

The decision to use Design-Build should be directly related to the attributes of the project to be undertaken, and the level of design control the agency wishes to exercise. Generally, as the desire to control design increases, the appropriateness of Design-Build decreases. Program and performance requirement issues that the agency has identified for the project also can affect the decision. Each construction project, large or small, is unique. There are a number of relevant questions to answer in making the decision to use Design-Build. Consider the following partial list:

- Is the project very large or very small?
- Is it technically complex or very repetitive?
- Does it involve a lot of design or can you "buy one in a box"?
- What level of design control is desired?
- Is the site suitable or will construction difficulties be encountered?
- Are there environmental issues on the site?
- Are there neighbors or is the project being built at an isolated site?
- Is schedule a critical issue?
- Does the agency have sufficient in-house project management expertise?

It is the combination of project-specific and organization specific factors that make each construction project unique. An objective assessment of the factors surrounding each project and an understanding of the advantages and disadvantages of the Design-Build delivery system will allow the agency to decide if the Design-Build approach will offer the greatest likelihood of delivering quality construction in a timely way at a reasonable cost. The primary advantages and disadvantages are discussed below.

1. Advantages

a. Single Point of Responsibility. The agency deals with one entity under the Design-Build approach. There is a single point of contact and contract responsibility for all performance during the project rather than the duel roles of design professional and contractor. For an agency with limited internal resources, this ability to focus contact and control can be an efficient way to manage a construction project. This contact focus also provides an effective way to manage user input into the design process. The Design-Build team looks to the point of contact for guidance, and the agency can set expectations at that point.

b. Clear Outcome Definition. If the agency is able to clearly define the expected project outcome through the development of detailed program or performance specifications, the Design-Build approach can be an effective way to deliver a construction project. Lower complexity (i.e., pre-engineered metal buildings) and higher complexity (convention center) projects or "cookie cutter" are good candidates.

c. Selection Flexibility. The selection of a Design-Builder through a competitive process other than low bid, allows the agency to select a contractor based on factors in addition to cost that have been determined to be important. Further, this process allows the agency to address issues that would be difficult to address under a pure low bid process. For example, project technical approach can be evaluated, or proposers may be requested to

propose unique performance guarantees to be incorporated into the project contract to assure that both broad and specific components of the project perform as expected.

d. Cost Containment. The ability to contain cost is an advantage of the Design-Build method under its primary compensation schemes:

- Lump sum: Lump sum contracts are typically arrived at by a competitive bid or proposal process. Any increase in cost after contract execution due to sub-bids higher than estimated, or costs from items not identified in the Design-Builder produced drawings, but part of the original scope, will be absorbed within the contract price. Conversely, savings belong to the Design-Builder in a typical lump sum contract. Variation in quantity of unit price line items may be an exception to this. Cost savings due to changes in quantity typically accrue to the agency. Note that unit price line items are less likely in Design-Build than in the typical Design-Bid-Build.
- Guaranteed Maximum Price: This method can be used for those situations where pricing is not easily determined prior to project procurement. Based on a program statement at the conclusion of schematic design, or later if desired, the selected Design-Builder does a comprehensive estimate of the cost to construct the project. This cost estimate becomes the basis for negotiation and establishment of a contractually agreed upon Guaranteed Maximum Price (GMP). This price includes two parts: 1) the expected cost to construct the project, and 2) a contingency amount that the Design-Builder believes should be available to cover changes. Any increase in cost due to sub-bids higher than estimated, or costs from items not identified in the drawings but part of the original scope must be absorbed within the GMP. Also under a GMP approach, cost savings may be allocated between the agency and the Design-Builder.

e. Reduced Change Orders. Reduced opportunity for change orders is an advantage of Design-Build.

- Lump Sum: The Design-Builder has no incentive to make changes which increase costs to the design that it is developing. All such costs must be borne within the contract price unless:
  - directed by the agency to proceed with a scope change; or
  - caused by concealed conditions or change of law

  In these cases, the Design-Builder may be entitled to an equitable adjustment, including profit as with traditional contracting.
- Guaranteed Maximum Price: The Design-Builder has no incentive to make changes to the initial design that require additional funds, since all costs must be held within the GMP. If the agency requests a major scope change, the Design-Builder generally receives some profit margin on the cost of the scope change. A scope change of this type may result in a higher rate of overhead.

f. Fast-Track Construction. With a consolidated design and construction team, it is straightforward and easier to implement fast-track construction. Different phases of the project development can overlap. In addition, the Design-Builder can order items with very long lead times before design is complete.

g. Continuous Operation. Schedule control exercised by the Design-Builder benefits projects that need to continue in operation during construction. The Design-Builder's control of both design and construction allows for maximum flexibility in sequencing, staging and work-arounds – all of which are important tools when working within a “continued operations” environment.

2. Disadvantages

a. Limited Design Control. Under Design-Build, either the contractor or the design professional takes the contractual lead and provides overall project leadership. The most common arrangement has the contractor in the lead. The resulting support role of the design professional means that the design professional has no direct contractual relationship with the agency but may have a professional obligation to the end user represented by the

agency. Further, the less than direct control of the design professional by the agency may mean that the agency's control of design issues is diminished under Design-Build.

b. Construction Quality Limitations. Since the typical Design-Build project emphasizes schedule, a focus on specific construction quality issues may be difficult to achieve. To avoid this situation, a detailed scope of work and performance specification clearly defining the quality requirements should be issued with the contract documents.

c. Cost Exposure. Use of Design-Build can create a false sense of reliance that cost containment will exist for the project.

- Lump Sum: The cost risk associated with 'scope creep' is borne by the Design-Builder except for agency-directed scope change. Unanticipated escalations in elements of costs are also borne by the Design-Builder, unless special escalation clauses are in the Design-Build contract. The Owner must still take the cost risks associated with unusual schedule delays and extreme weather.
- Guaranteed Maximum Price: If the design requirements are not carefully specified, the Agency may be responsible for additional costs under a GMP.

d. Significant Staff Time. The Design-Build programming and procurement process requires a significant amount of agency staff participation as well as specific Design-Build experience. The Design-Builder will look to the agency to have made a number of decisions about program and specification issues. Public agencies without Design-Build procurement knowledge will need additional resources to use the Design-Build process effectively.

B. AGENCY - LEGAL REQUIREMENTS

Alternative contracting methods have significantly different legal requirements than the typical Design-Bid-Build project delivery method. Public agencies should seek qualified legal counsel before using Design-Build. The following discussion summarizes Oregon statutory and administrative rule requirements (through February, 2002) related to the required exemption and other miscellaneous legal considerations related to use of the Design-Build method. Note, however, that the underlying statutes are likely to be changed in the 2003 legislative session as part of a planned general revision of ORS Chapter 279 (reference House Resolution 1, 2001 Oregon Laws, and industry wide efforts through the House Interim Work Group on Public Contracting Law).

1. Oregon Revised Statutes (ORS).

a. Framework. The public contracting laws in Oregon, primarily contained in ORS Chapter 279, do not currently provide a statutory framework for alternative contracting methods such as Design-Build or CM/GC. Rather, the approach under ORS 279.015 is to require that Public Improvements be undertaken through competitive bidding (low bid), while allowing exemptions to sealed bidding under strict procedural safeguards. Design-Build is referenced only at ORS 279.029(4)(b), which limits the performance bond or other performance obligation to completion of the design services portion (not covering subsequent damages), and at ORS 383.005(1)(a), which refers to that form of contracting in connection with ODOT toll way projects. Also note that while ORS 351.086 generally exempts the Oregon University System from ORS Chapter 279 public contracting requirements,
including the competitive bidding exemption process, the bonding requirements still apply under that statute.

ORS 279.029(4)(b) is part of the statute on contract award under competitive bidding (Invitations to Bid), although Design-Build services are customarily procured through requests for proposals. The prevailing view is that Design-Build contracts may be procured by competitive bidding under the right circumstances; that is, when the design services are minimal and may be provided by any licensed design professional meeting minimum stated requirements, no negotiation will take place, and selection of the Design-Build contractor is based entirely

on price. In such cases the procurement would proceed under customary competitive bidding procedures, and an exemption would not be required.

Design-Build contracting was recently recognized as lawful under Oregon Laws 2001, Chapter 362 (House Bill 2936). ORS 671.030, regarding the practice of architecture, was amended to allow licensed construction contractors to offer services constituting the practice of architecture, provided that (a) the services are "appurtenant" to the construction services to be provided by the contractor, (b) the design services are performed by a registered architect, and (c) the offer by the construction contractor discloses in writing that the contractor is not an architect and identifies the registered architect that will perform the design services. ORS 672.060, regarding the practice of engineering, was similarly amended.

b. Exemptions. When an exemption to competitive bidding is required, ORS 279.015(2), (3) and (6) specify the process that must be followed, including required findings as set forth in those statutes and defined at ORS 279.011(5). Those findings fall into three categories:

- It is unlikely that the exemption will encourage favoritism or substantially diminish competition [ORS 279.015(2)(a)],
- Award pursuant to the exemption will result in substantial cost savings to the agency, or to the public for certain ODOT projects [ORS 279.015(2)(b)], as amended in the 2002 Special Session, and
- Justification for conclusions, including information on operational and financial data, public benefits, value engineering, specialized expertise, public safety, market conditions, technical complexity and funding sources [ORS 279.011(5)].

c. Public Improvement Contract Requirements. Because construction services generally predominate Design-Build contracts, they are considered to be Public Improvement contracts when undertaken by public agencies in Oregon. ORS 279.015(3) therefore requires public notice and an opportunity to comment on the draft exemption findings. ORS 279.057, requiring qualifications based selection process (in which price is not an initial evaluation criterion) in contracting for registered design professionals and land surveyors, does not apply. Finally, ORS 279.103 requires a written post-project evaluation to address statutory factors and provide an objective assessment of the use of the alternative contracting method. This statutory framework is described in detail in the administrative rules discussed below. The relevant statutes are also contained in the attached Attachment 3.

d. Subcontractor Disclosure. The subcontractor disclosure requirements at ORS 279.027(3), and related substitution of disclosed subcontractors under ORS 279.322, apply only to competitive bidding, and not to Contracts that have been exempted from the requirement.

2. Oregon Administrative Rules (OAR)

a. AG's Model Public Contract Rules. Whether or not an agency is required to adhere to the *Oregon Attorney General's Model Public Contract Rules* ("Model Rules"), as referenced below, the Model Rules do provide a useful guide for Design-Build procurement. The rules are contained in a special series on "alternative contracting methods" at OAR 137-040-0500 to 0590. The general procedural rules are:

- OAR 137-040-0510 Definitions.
- OAR 137-040-0520 Use of Alternative Contracting Methods.
- OAR 137-040-0530 Findings.
- OAR 137-040-0540 Pricing Mechanisms.
- OAR 137-040-0550 RFP Process.

In addition to the above, OAR 137-040-0560 specifically addresses the Design-Build form of contracting, including benefits that should be anticipated, selection criteria, inapplicability of the ORS 279.057 "Qualifications Based Selection Process," professional licensing issues, and performance bonds or other security. OAR 137-040-0560(7), contains a checklist for matters to be addressed in Design-Build contracts, including description of the design services, professional liability, risk allocation, warranties, incentives and honoraria.

b. Determining Applicable Contracting Rules. ORS 279.049 provides the statutory authority for promulgation of the Model Rules. All public agencies that have not adopted their own contracting rules under provisions of that statute are subject to the Model Rules pursuant to ORS 279.049(4). This statute may be inapplicable where a statutory exemption exists, such as for the State System of Higher Education under ORS 351.086 (and see OAR 580-050-0032 for authority to utilize Design-Build within the Oregon University System). Public agencies may also have opted out by adopting their own rules under ORS 279.049(5). See, for example, ODOT rules at OAR 731-007-0010 to 0190, which closely parallel the structure of the Model Rules (including Alternative Contracting Methods such as Design-Build under OAR 731-007-0190).

3. Socio-Economic Programs (Federal, State and Local)

Overlaying these general procedural rules are a variety of federal, state and local "socio-economic" programs, all of which are intended to accomplish additional benefits in the expenditure of public funds. For example, most state agencies administer affirmative action programs that benefit Emerging Small Businesses in subcontracting practices (*see* ORS Chapter 200 and OAR applicable to a particular contracting agency). Other state or local programs may require sustainability initiatives ("green building" standards), use of inmate labor (e.g., for certain Oregon Department of Corrections contracts), compliance with "Work Force Training and Hiring" standards (for certain contracts with the City of Portland, the Portland Development Commission and Multnomah County), and similar initiatives.

Federal law may also require that state and local public agencies desiring to use federal grant funds comply with special grant conditions, many of which support federal socio-economic programs. For example, Tri-Met and ODOT administer a federally mandated Disadvantaged Business Enterprise (DBE) Program, in which strict subcontracting goals (or a demonstration of Good Faith Efforts) are utilized to the benefit of certified DBE firms. ORS 279.056 and similar statutes provide an override of state contracting statutes when federal funds are utilized and federal laws either conflict with state law or require additional conditions in public contracts.

Because socio-economic programs vary between jurisdictions, and sometimes depend upon different funding sources (local or federal) even within the same agency, it is imperative that such programs be clearly articulated in both the Design-Build procurement documents and contracts. Note that some of these requirements apply only to the solicitation process, while others are continuing obligations running throughout the contract term. Specific requirements in this area should be clearly identified by the agency.

C. DESIGN-BUILD ALTERNATIVES

There are many types of Design-Build processes. Figure 2 illustrates possible combinations of assessment, selection method, scope definition and pricing alternatives.

Note: To use the following grid, a selection in each column is independent and can be combined with a selection from any other column.

FIGURE 2
DESIGN-BUILD ALTERNATIVES
(Select one from each column to develop a Design-Build process)

RISK DEFINITION (functions to be assumed by D/B)	SELECTION METHOD (selection method)	SCOPE DEFINITION (program & performance standards)	PRICING ALTERNATIVES (pricing format)
Design-Build	Single Phase (Open) Competition (best-value or price only selection)	Facility Program & Performance Specifications	Lump-Sum
Design-Build-Finance	Two-Phase (Invited) Competition (generally best-value)	Program & Bridging Design with prescriptive and/or performance specifications	Lump-Sum with a Cap (Agency sets maximum acceptable price)
Design-Build-Operate	Negotiated Selection (negotiations may be conducted with single or multiple parties)	Performance Requirements alone (example: power plant or a waste water treatment facility)	Stipulated-Sum (Agency sets same price in advance for all submissions)
Design-Build-Maintain	Design Only with options for a noncompetitive Design-Build contract or traditional competitive bidding (a variation of Negotiated Selection. See AIA Forms Direct Selection	Performance Requirements for specific facility components only	Guaranteed Maximum Price (GMP)
Design-Build-Develop (site specific or non-site specific, and may include multiple occupancy)		Any of above with unsolicited alternates	Cost-Plus Percent Fee—where allowable (may include incentives and disincentives for budget schedule or safety targets
Combinations of above		Undefined Scope (emergency work)	Cost-Plus Fixed Fee (may include incentives and disincentives for budget schedule or safety targets)
			Unit Cost (example: price/stall in a parking garage)
			Any of above plus Unit Prices for specific project elements
			Any of the above plus escalation formulae for labor and material components of long-term contracts.
			Billing Rates plus reimbursable expenses
			Combinations above plus incentives and disincentive for budget schedule or safety targets

IV. STEPS TO DESIGN-BUILD COMPETITIVE SELECTION

Assuming the agency has made the decision to move forward with a Design-Build process, the following are suggested steps to select a Design-Builder. It should be noted that this is not a linear procedure and the steps should be considered in their entirety before initiating action.

A. STEP ONE: FULFILLING LEGAL REQUIREMENTS

Refer to Section III, *Agency - Legal Requirements,* for an explanation of what is required.

B. STEP TWO: REQUEST FOR DESIGN-BUILD QUALIFICATIONS (RFQ)

Typically, the information a potential proposer will need to determine the project's appropriateness for his/her firm, and the design expertise required to compete for the contract is more that can conveniently be communicated in a classified advertisement or announcement. RFQ documents should be published separately and distributed to interested parties, with a record kept of all such RFQ holders. The latter is to judge the level of interest in the project (competition), and to have the ability to amend the document or to distribute additional information (Q&A). Interested Design-Build teams should be requested to submit a Qualifications Statement describing the firms and individuals comprising their design and construction team. Applicants should be cautioned that, after acceptance by the agency, the composition of their team cannot be changed without the agency's written permission.

ELEMENTS OF A DESIGN-BUILD REQUEST FOR QUALIFICATIONS

- Identification of Agency
- Description of Project and Scope
- Project Type & Size
- Estimated Design-Build Contract Cost Range
- Project Schedule
- Type of Design-Build Competition
- Selection Process
- Key Dates in Proposal Process
- Pre-Submittal Conference
- Communications with Agency (Q&A)
- Number of Finalists
- Honoraria
- RFP Requirements
- Summary of RFP Selection Criteria
- Basis of Award
- Identification of Selection Panel Members
- Bonding and Licensing Requirements
- Other Mandatory Requirements (Insurance)
- Submittal Requirements
- Qualification Selection Criteria
- Submittal Deadline & Address
- Socio-Economic Programs (if required)

1. Single-Phase Selection. If the agency opts to utilize a single-phase selection method, the qualifications of the proposers are usually solicited as part of the Request for Design-Build Proposals (RFP). Otherwise, the agency is advised to request qualifications of potential proposers (Design-Builders) through a separate RFQ process. Appropriate examples would be emergencies, specialized capabilities, sole source or pre-engineered metal buildings. Cost of proposal preparation must be considered.

2. Two-Phase Selection - Initial Qualification. The more common selection method is the two-phased approach - one that initially requests qualification statements from any interested Design-Builders and secondly requests proposals from qualified Design-Builders identified in the initial phase. Most projects are best served by limiting the number of proposers to a selected few Design-Builders, typically three to five, because of the cost and complexity of preparing a Design-Build proposal and the need to encourage a high level of competition.

3. Selection Committee. As part of the solicitation process, the agency must appoint a selection committee. The number of committee members is normally five to twelve, but can be more. It is recommended that selection committee members be knowledgeable about the project requirements including both design and construction

aspects. They may represent the various stakeholders associated with the project, including the agency's senior management, facility users, community members, at least one design professional that is not an agency employee and a construction industry representative.

There are two philosophies regarding identification of selection committee members in the RFQ. The Agency should evaluate whether:

- Naming the selection committee will alleviate the problem of identifying with whom proposers can and cannot discuss issues relevant to the project; or
- Naming the selection committee would allow proposers an advantage by writing the proposal to a specific committee member's personality or expertise

At a minimum, the RFQ should list the functional responsibilities of the committee members in their regular employment. The RFQ should specify whether or not the selection committee will be the same as for the RFP process.

4. Evaluating Qualifications. The appointed selection committee has the task of evaluating qualification statements and recommending a "short-list" of the best-qualified teams of design professionals and contractors. Staff, consultants and other technical advisors may assist them. The evaluations are limited to the qualification selection criteria listed in the RFQ. The number of finalists is likewise limited to the range stated in the RFQ.

C. STEP THREE: REQUEST FOR DESIGN-BUILD PROPOSALS (RFP)

ELEMENTS OF A DESIGN-BUILD REQUEST FOR PROPOSALS

Proposal Requirements:

- Identification of Agency, Consultants, Selection Committee & Design-Build Teams
- Instructions to Proposers
- Eligibility & Honoraria
- Communications
- Pre-Proposal Conference(s)
- Competition Schedule
- Proposal Form
- Alternates (if any)
- Proposal Exhibits (drawings & specs)
- Presentations
- Disqualification
- Weighted Selection Criteria
- Scoring & Selection Process
- Basis of Award
- Information Provided by Agency

Contract Requirements:

- General Conditions of the Contract
- Supplementary Conditions of the Contract
- Agreement & Bond Forms

Program Requirements:

- Tabulation of Space Requirements
- Environmental Requirements
- Proximity Diagrams
- Standard Specifications (if any)
- Conceptual Design (if any)

Performance Requirements:

- Performance Specifications
- Bridging Documents

Information Provided by Owner:

- Maps, Surveys

Other Requirements:

- Socio-Economic Program Requirements
- Wage Rate Requirements

1. The RFP Document. A request for Design-Build Proposals is typically divided into four primary components. In addition to these, the RFP may include other miscellaneous requirements such as Socio-Economic Programs or Wage Rate Requirements (BOLI). The primary components are:

a. Proposal Requirements. Similar to Instructions to Bidders in conventional bid documents, the proposal requirements specify how the proposal phase of the solicitation will be conducted, and how the proposals will be compared and evaluated including specific evaluation criteria and the scoring process. If the selection committee for the RFP process is different from the one empanelled for the RFQ process, the same considerations apply as noted earlier for the RFQ phase. Unless specifically incorporated, proposal requirements do not become part of the final contract document.

b. Program Requirements. For building projects, in this section the agency must specify the physical space and/or operational requirements of the project. Information for building projects would likely include tabulation of required net floor areas, adjacency requirements, environmental requirements (heating, cooling, lighting, utilities, etc.) of each type of space (offices, conference rooms, work rooms, etc.).

For transportation projects, the agency must specify the type, size and location of the project. Project limits, such as Rights-of-Way, and geo-technical, hydraulic and/or environmental constraints should be addressed. Requirements such as applicable AASHTO (American Association of State Highway and Transportation Officials) and ODOT (Oregon Department of Transportation) Standard Specifications are included by reference typically.

Typically, even Design-Build transportation projects will have undergone some conceptual design and initial development prior to issuance of the Design-Build solicitation. Those conceptual design documents commonly known as bridging designs which embody the intent of the agency may be included in the solicitation. The agency should carefully review these design documents and clearly identify which are requirements and which are made available as guides or examples only. The amount of design requirement documentation should be kept to a minimum to give bidders the maximum flexibility to pursue their unique approaches to technical superiority and cost minimization.

c. Performance Requirements. For building projects, performance specifications describe the agency's expectations for the technical performance of each of the structure's components and assemblies (foundations, superstructure, shell, interiors, services, etc.). The level of detail may vary widely dependent on the nature of the project and potential proposer. The proposers guarantee that they will design and construct a project that will perform as specified after it is accepted and occupied or put into service, and throughout the warranty period.

For transportation projects, performance requirements describe the agency's expectations for the technical performance of the project and its key subsystems, assemblies and sub-elements, such as bridge load rating, roadway and/or bridge capacity, design speed and pavement performance requirements.

d. Contract Requirements. This section includes the General Conditions of the Design-Build Contract, Supplementary General Conditions, Agreement Form, Bond Forms, and required certifications such as tax certificates, non-collusion DBE.

2. Administering the Proposal Phase. The agency's task during the proposal phase is to communicate its needs and requirements to the proposers adequately and to assure that all proposers are treated fairly and equitably. The agency will conduct informational meetings with the proposers, respond to their questions, and furnish any available information that will facilitate design and construction. To the extent that this information can be complete and accurate, it will reduce the selected Design-Builder's potential claims for changed conditions or change of scope after contract award.

D. STEP FOUR: RECEIPT AND EVALUATION OF DESIGN-BUILD PROPOSALS

TYPICAL PROPOSAL SELECTION CRITERIA

- Design professionalural Image and Character (Building Project)
- Technical Innovation and Environmental Acceptability of the Engineered Solution (Engineering or Architectural Project)
- Functional Efficiency and Flexibility
- Quality of Materials and Systems
- Socio-Economic Programs
- Disruption To Ongoing Activities
- Quantity of Usable Floor Area
- Convenient Disabled Access
- Safety and Security
- Energy Conservation
- Operation and Maintenance Costs
- Life-Cycle Cost
- Cost/Value Comparison
- Completion Schedule
- Energy Conservation and Sustainability

1. Minimum Proposal Requirements. The agency first reviews all proposals to verify that each meets the minimum proposal requirements (bid or proposal guarantee, price, alternates, and required exhibits). Proposals not meeting the minimum requirements must be deemed non-responsive. Some RFPs limit the amount and types of proposal exhibits that can be submitted in addition to the minimum submittal requirements. This is done to focus the responses and assure an equitable and manageable selection process.

2. Technical Evaluation. Depending on the degree of complexity, Design-Build proposals may be first evaluated by appropriately skilled and experienced technical staff members and consultants. Technical evaluators limit their evaluations to their own individual areas of expertise. They typically do not score or rank the proposals; rather they often prepare written technical evaluations and report their findings to the selection committee. They serve as the *ad-hoc* technical staff of the selection committee for the duration of the proposal evaluation phase.

3. Clarifications. In the process of evaluation, the procedure may allow questions and ambiguities to be resolved by the proposers. The process of requesting and receiving proposal clarifications should be in writing with specific deadlines for responses. Proposers' clarifications may be included in the contract documents. However, changes of scope or price should not be accepted by the agency in the clarification process. These matters are best addressed through Best and Final Offers (BAFO) or during contract negotiations.

4. Presentations. Except for the simplest projects, it is appropriate to allow the finalists an opportunity to present their Design-Build proposals to the selection committee in person and, if allowed, respond directly to the selection committees' questions. Any statement or response that is significant and material to the proposal may need to be clarified in writing by the proposer prior to the selection committee's final deliberations.

5. Best and Final Offers. Following preliminary discussions or formal interviews with proposers, Best and Final Offers (BAFOs) may be called for by the agency. Finalists are allowed an opportunity to submit their best prices and/or technical responses in reply to the agency's request. In effect, this step levels the playing field by allowing finalists an opportunity to provide their BAFO after interviews have been conducted. In calling for BAFOs, the agency may elect to issue a final set of instructions, including agency decisions made during the course of discussions and assumptions that proposers should make in submitting BAFOs. In this process, the agency may suggest areas that proposers would want to consider in submitting a BAFO (including clarifications and changes), but the decision on structuring offers is still left with proposers.

6. Selection Committee Deliberations and Recommendation. After the selection committee has completed the information gathering and evaluation process outlined in the solicitation documents, they typically meet to discuss the proposals among themselves and arrive at a recommendation. There is no limit to the aspects

of the proposals that the selection committees may discuss, but the selection committees' individual scorings that determine the successful proposal are limited to the Weighted Selection Criteria listed in the RFP. The highest scoring proposal is the only proposal that the selection committee would normally recommend to the agency. Alternatively, they may recommend no award, or an award to the highest scoring proposal subject to specific conditions of acceptance of the proposal. It is recommended that the agency structure the selection process to limit its final decision to accepting or rejecting the recommendation of the selection committee. This voids the use of unpublished criteria to evaluate proposals. Records of the selection committees' scoring sheets and conditions pertaining to the recommendation, if any, must be retained in the project file. It is recommended that records of individual scores, along with the technical evaluation reports, be available for examination by the proposers, but typically only after the agency acts on the selection committee's recommendation.

E. STEP FIVE: CONTRACT AWARD

1. Contract Negotiations. Following selection of the highest ranked proposer, the agency may conduct contract negotiations only in accordance with applicable contracting rules. Agency practices vary as to the scope of these negotiations. The best practice is to encourage questions or comments on the contract documents within the procurement process, in order to allow consideration of changes during the addenda period, and to announce the scope of negotiations (if any) within the RFP. See, for example, the Model Rule limitations at OAR 137-040-0550(3), 137-030-0010(3)(c)(iii) and 137-030-0090(5). The RFP should fully describe the negotiation process, including whether negotiations will be conducted with all finalists within a competitive range or only with the highest ranked proposer, how negotiations may be terminated with one proposer and undertaken with another, and how a contract will ultimately be awarded.

2. Post Award Procedures. The procedures to award a Design-Build contract are similar to those used with conventional construction contracts. The requirements for performance and payment bonds, and for certificates of insurance are similar to typical public contracts for construction. The agency should take care to include all of the successful proposer's exhibits (drawings and specifications) and proposal clarifications in the list of contract documents. The proposal exhibits should not take precedence over the Program and Performance Requirements of the RFP.

V. THE CONTRACT

A. CONTRACT VARIATIONS

Each of the following contract variations present opportunities to vary the degree of agency involvement and to emphasize one or more specific characteristic of the Design-Build method of contracting (single point of responsibility, fast-track or phased construction, early price commitment, cost containment, continuous operations and good quality results). Each contract type also presents different risk allocation issues that must be balanced in the context of each project. Standard Design-Build contract forms are available through the American Institute of Architects (AIA), Engineers Joint Construction Document Committee, (EJCDC), Associated General Contractors (AGC) and Design Build Institute of America (DBIA). These forms differ significantly in their treatment of risk allocation provisions and should be reviewed carefully prior to use.

- Design-Build: The agency prepares procurement documents and then contracts with a Design-Builder to design and construct the project.

- Design-Build Operate: Same as above except Design-Builder provides additional services such as site acquisition, finance, or maintenance and operation.

- Integrated Design-Build: The agency utilizes an integrated Design-Builder (has both in-house design and construction expertise) that engages trade subcontractors, consulting engineers and suppliers.

- Contractor-Led Design-Build: The agency contracts with a general contractor that acts as the Design-Builder and that engages the design professionals, trade subcontractors and suppliers.

- Designer-Led Design-Build: The agency contracts with a design professional that acts as the Design-Builder and that retains additional design professionals, consultants and a general contractor that then engages trade subcontractors and suppliers.

- Developer Led Design-Build: The agency prepares procurement documents and then engages a developer. The developer engages a design professional and a general contractor that retains trade subcontractors and suppliers.

B. SPECIAL CONTRACT ISSUES

1. The Design Professional's Responsibility to the Agency. The Design-Builder is responsible to the agency for both the design and the construction of the project according to standards of performance that are either specified in the contract documents or are described in terms of an industry standard. Under most Design-Build contract types, the design professional's primary responsibility runs to the Design-Builder with whom it contracts.

The Design-Builder relies upon its design professional to provide services to facilitate and support the Design-Builder's performance. Under these contract types, the design professional's responsibility to the agency is the responsibility to refrain from causing injury to property or person through professional negligence. In this context, the agency will generally not have a contractual right to recover economic losses that result from the design professional's negligence directly from the design professional. Instead, the agency will look to the Design-Builder for relief under the contract based on performance standards and warranties. However, if the agency is designated as a *third party beneficiary* of the contract between the design professional and the Design-

Builder, the agency will have the right to hold the design professional as well as the Design-Builder responsible for professional negligence.

2. Allocating Risk Among the Parties. It is not within the scope of this paper to address all of the risks associated with Design-Build construction such as:

- design errors/omissions revealed during construction
- constructibility of design
- establishment of project cost
- quality control
- responsibility for obtaining permits/approvals
- strike or labor disputes
- weather conditions
- catastrophes
- third party litigation
- design changes
- delays
- changes of law

Agencies should perform a risk analysis that identifies the risks presented by each project, the likelihood of occurrence, the level of severity and the party to whom the risk should ultimately be allocated, as well as any methods of reducing or managing risk. Typically, risk is allocated in the contract through contract provisions such as limitation of liability clauses, indemnification clauses, and transferring risk to third parties through surety bonds and insurance.

3. Design Review and Approvals. Normally, the Design-Builder provides the design and construction documents, and, therefore, the agency is generally not responsible for design or construction defects. Excessive agency involvement in design (for example - overly detailed programming requirements) can shift the "single point of responsibility" from the Design-Builder back to the agency. After contract award, although design documents are subject to the agency's periodic review and in some cases approval, this risk is not substantial unless the agency exerts too much control over design details. For example, if agency approvals contain conditions, directions, or recommendations, with which the Design-Builder complies, the agency may become responsible for impacts of owner-directed changes. Generally, however, both the agency and the Design-Builder benefit from design reviews, which can expose latent problems in the program, performance standards, or design at an early phase of the project.

The timing and the nature of design and document review should be clearly set out in the Design-Build contract. The Design-Build contract should set out the degree to which the Design-Builder can rely upon agency approvals and any limitations on the right to rely. Qualified reviewers should conduct the reviews as provided and approvals should be consistent in form and content.

4. Warranties / Standard of Care. Most warranty obligations in Design-Build contracts are the same as those in traditional Design-Bid-Build construction contracts. These warranties should not present significant risk to the Design-Builder since the Design-Builder is in control of not only the construction but also the design of the project. Nevertheless, the possibility of design defects raises unique risk allocation issues with respect to both warranties and the design professional's standard of care due to the fact that in most Design-Build contracts, the design professional is contractually obligated only to the Design-Builder and not the agency.

Like traditional Design-Bid-Build construction contracts, Design-Build contracts typically contain the contractor's express or implied warranty that the project is constructed in a good and workmanlike manner (standard for the industry) and according to the contract documents (i.e. drawings and specifications). However, because the Design-Builder is also responsible for the design of the project, the Design-Build contract will also contain the contractor's obligation to provide a design that meets either the industry standard or the particular standard provided for in the contract, and that conforms to the contract documents. Depending on the type of project involved, the Design-Build contract may also contain other express warranties pertaining to the

characteristics or capabilities of the completed project, including but not limited to warranties that the design will meet particular project performance guidelines or budget guidelines.

Therefore, in the Design-Build context, the risk of design-defects shifts to the Design-Builder and ultimately to the design professional. In the event the project does not conform to the contract documents it must be corrected at the cost of the Design-Builder. It is important to seek the advice of insurance professionals when drafting design-defect risk allocation provisions because design professional errors and omissions policies do not all provide coverage for breach of standards of care more specific than the industry standard.

5. Performance Bonding. Under Oregon law, performance bonds are generally required for Public Improvement contracts. However, because there are a variety of legal exemptions and jurisdictional variations, public agencies should consult with counsel or the appropriate jurisdictional authorities concerning bonding requirements for each project. When performance bonds are not mandatory, the decision-maker must balance the project risks against the cost of the protection afforded by the bond. Considerations may include the financial strength of the Design-Builder, familiarity with and past performance of the Design-Builder, and the complexity of the project. Performance Bonds (protecting the agency's interests) should not be confused with Payment Bonds, which may be separately required as a source of protection for subcontractors and suppliers. *See* ORS 279.029(4) and 279.526 to 542.

Unless otherwise specified by the parties, the performance bond obligation of the surety for design services (as opposed to construction services) under a Design-Build contract is limited to "preparation and completion of the design and related services covered under the contract". *See* ORS 279.029(4)(b). Under this statute, after final completion (or longer if defined in the contract) the surety is not liable for damages attributable to the design, including corrective action and latent defects.

However, expanded coverage and newer surety instruments are becoming increasingly available in the market place. Consistent with the *Attorney General's Model Public Contract Rules,* Design-Build contracts must specifically address performance security and insurance coverage requirements. *See* OAR 137-045-0560.

6. Insurance--Comprehensive General Liability ("CGL") and Errors and Omissions ("E&O")
CGL insurance for Design-Build projects is substantially the same as that written for traditional Design-Bid-Build construction projects. E&O insurance is now readily available to Design-Builders to cover the design component of their operations--even if the Design-Builder does not have a design professional as an employee. As a practical matter, separate E&O insurance may be unnecessary if the Design-Builder has significant financial strength or if the Design-Builder's CGL policy contains no E&O exclusions.

7. Changes in the Scope-of-Work. A "change in the work" is an element of any form of construction contract. However, the measuring stick for determining what is a change under the Design-Bid-Build construction contract is different than the measuring stick used to determine whether there is a change under a Design-Build contract.

Design changes do not necessarily result in a change order under Design-Build. In a Design-Bid-Build construction contract, the scope of the work is based upon the design the agency gives to the general contractor. In contrast, in a Design-Build contract, the scope of work given to the contractor is usually more general and does not include detailed design data.

In a Design-Build project, errors and omissions in the design are not necessarily causes for a change order. As long as the changes are within the scope of the information given to the Design-Builder, a change in design would not be the basis for a change in the contract. In fact, this situation may arise during the course of the

agency's design review or design approval that the agency may have reserved to itself under the terms of the Design-Build contract.

This differing concept of "design change" under Design-Build has significant impacts on the administration of the contract. Certain traditional risks held to be the public agencies, may be shifted to the Design-Builder. For example, the agency no longer warrants that the project can be built using the design information that is provided to contractor and responsibility for compliance with building codes is typically shifted to the Design-Builder.

The agency may also find negotiation of changes different under Design-Build. Because the contractual alignments of the parties differ from the standard Design-Bid-Build approach, the agency will not be able to rely upon the design professional for advice and counsel. The agency is instead negotiating with the Design-Builder, who is a combination of a design professional and contractor. Because of this shift in roles, the agency may find it useful to have its own design staff or to use an outside consultant.

Other basis for changes in the Design-Build contract are not altered. There may be many other basis for a change to the contract. Such changes would be based upon the risk allocation formula included in the contract. Any change in that risk allocation formula could become a basis for either the agency or the Design-Builder to request a change. Examples include, but are not limited to, discovery of underground conditions that were significantly different than anticipated where that risk was retained by the agency; the agency's inability to obtain land use approvals; or instances where delays or additional cost have been caused by items beyond the control of either party, often known as "force majuere."

8. Design-Build Subcontractor Selection. When the Design-Builder (or other General Contractor) is selected through price competition, the agency usually imposes no conditions upon how subcontractors are selected. When the Design-Builder is selected by an alternative method, the same rationale would lead the agency to allow the Design-Builder to use alternative methods for subcontractor selection. In practice however, public agencies typically continue to require some level of selection through price competition for subcontracts even when the Design-Builder is selected using an alternative qualifications based approach. The factor often cited is the desire to maximize competition and to avoid any appearances of favoritism because subcontractors usually perform a large portion of the work. [1] Where factors other than price (qualification, technical approach, etc) are important, some selection process that takes into consideration such factors may be warranted. The agency may allow this process by outlining the requirements in the Design-Build contract.

Under traditional Design-Bid-Build as well as under Design-Build, a number of subcontractors often assume design responsibility for some part of the scope of work. Typical examples include electrical, mechanical and fire protection systems. In the private sector, the owner may retain the rights to approve those design-build subcontractors. Similarly, on some highly complex and complicated Design-Build projects, the agency may require that key design-build subcontractors propose as a part of the initial Design-Build Team.

9. Completion. For most construction contracts, the definition of substantial completion is usually couched in terms of when the project can be used for its intended purpose and the project's design professional, along with the owner, are involved in the decision. However, with Design-Build, who makes the determination of substantial and final completion is altered. Since the design professional is part of the Design-Builder team, the agency may wish to have an independent design consultant or design staff to assist in making this evaluation.

The criteria for determining completion of a project may also be different under Design-Build. Completion of the project is measured against the project description and the performance scope given to the Design-Builder by

[1] Associated Builders and Contractors v Tri Met, 170 Or App 271, 12 P3d 62(2000)

the agency or other specific criteria listed in the Design-Build contract. It is no longer linked to the specific design prepared by the design professional.

Thus, under completion and acceptance of Design-Build projects, the process for determining completion does not change, but the criteria for determining completion and the parties involved will. Additionally, the warranties given by the Design-Builder under a Design-Build contract are more important than those given under the traditional Design-Bid-Build contract due to the presence of performance requirements of Design-Build.

VI. POST PROJECT EVALUATION

ORS 279.103 requires that a unit of government prepare a formal post-project evaluation of public improvement projects in excess of $100,000 for which the competitive bidding process was not used. The use of the Design-Build approach when selected through the Request for Proposals method makes the agency subject to the requirements of ORS 279.103.

The purpose of the ORS 279.103 evaluation is to determine whether it was actually in the agency's best interest to use an alternative contracting method (e.g., the Design-Build approach). The statute describes the timing and content of this evaluation, with three required elements:

a) Financial Information, consisting of cost estimates, any Guaranteed Maximum Price, changes and actual costs.
b) A narrative description of successes and failures during design, engineering and construction.
c) An objective assessment of the use of the alternative contracting method as compared to the exemption findings.

An effective way to present the required report is to simply comment on each finding or conclusion made in the original project exemption order.

Questions or suggestions for future revisions should be directed to:

Public Contracting Coalition
c/o Associated General Contractors
9450 SW Commerce Circle, #200
Wilsonville OR 97070
(503) 682-3363 (Phone)
(503) 682-1696 (Fax)
www.agc-oregon.org

ATTACHMENT 1
DESIGN-BUILD RESOURCES

Contracts and Other Forms:
U.S. Government Standard Form (SF) 254 Designer-Engineer and Related Services Questionnaire, and
U.S. Government Standard Form (SF) 255 Designer-Engineer and Related Services Questionnaire for Specific Project:
U.S. Government Printing Office (GPO)
710 North Capitol Street, NW
Washington, DC 20401
Telephone Orders: (202) 783-3238
(8:00 a.m. – 4:00 p.m. EST)
Also available at anyone of 24 regional stores across the country

AIA Document A305, Contractor's Qualification Statement
AIA Family of Design-Build Documents:
American Institute of Architects
1735 New York Avenue, NW
Washington, D.C. 20006
Telephone: (202) 626-7300
web page: http://www.e-architect.com

Also available at AIA Chapter offices in all major U.S. cities.

CSI *UniFormat™:* A Uniform Classification of Construction Systems and Assemblies (1997 Edition):
CSI *PerSpective™:* Windows-based performance specification software:
EJCDC Design/Build Documents (available in hardcopy and electronic media):
Construction Specifications Institute
P.O. Box 85080 (Technical Document Catalog)
Richmond, VA 23285-4236
Telephone: (800) 689-2900 or
Fax (703) 684-8436
e-mail: membcustsrv@csinet.org
web site: http://www.csinet.org/

AGC Standard Design-Build Documents:
The Associated General Contractors of America
Publication Department
1957 E Street N.W.
Washington, D.C. 20006-5199
Telephone: (202) 393-2040
Order Department Fax: (202) 737-5011
Also available for AGC Oregon-Columbia Chapter: (503) 682-3363, 1-800-826-6610 or via the website at: www.agc-oregon.org

DBIA Manual of Practice, Standard Forms of Agreement, Standard Form of General Conditions of Contract and other design-build documents:
Design Build Institute of America
1010 Massachusetts Avenue NW
Suite 350
Washington, D.C. 20001
Telephone: (202) 682-0110 or
Fax (202) 682-5877
e-mail: dbia@dbia.org
web site: http://www.dbia.org/

Books:

Design-Build: Planning through Development, Jeffrey L. Beard, Michael C. Loulakis, Sr., and Edward C. Wundram, McGraw-Hill, 2001

Design-Build Contracting Formbook, and Design-Build Contracting Handbook, both edited by Robert F. Cushman and Kathy Sperling Taub, John Wiley & Sons, Inc., 1997

The Design-build Process: A guide to Licensing and Procurement Requirements in the 50 States and Canada, edited by John R. Heisse, II.

Selecting Project Delivery Systems, Victor Sanvido and Mark Konchar

Understanding the Legal Aspects of Design-Build, Timothy R. Twomey, Esq., AIA

Project Delivery Systems: CM at Risk, Design-Build, Design-Bid-Build, Construction Industry Institute

Project Delivery Systems for Building Construction, Robert W. Dorsey, Published by Associated General Contractors of America

The Property Professional's Guide to the Design-Build Process, Published by Associated General Contractors of America and the Building Agencys and Managers Association International

Design-Build Deskbook, Published by the American Bar Association

Compact Disks:

Construction Project Delivery Systems: Evaluating the Agency's Alternatives. Michael C. Loulakis, A/E/C Training Technologies

ATTACHMENT 2
GLOSSARY OF TERMS

Adjusted Low Bid: A form of best value selection in which qualitative aspects are scored on a 0 to 100 scale and expressed as a decimal; the proposal price is then divided by the qualitative score to yield an "adjusted bid" or "cost per quality point." Award is made to proposer with the lowest adjusted bid. This is not "competitive bidding" for the purposes of ORS 279 compliance, and an exemption is therefore requirement.

Alternative Contracting Method: A selection method other than competitive or low-bid (Design-Bid-Build method) that generally considers factors in addition to cost. The most common alternative methods are Design-Build and CM/GC.

Best Value: Also known as "greatest value" - any selection process in which proposals contain both price and qualitative components, and award is based upon a combination of price and qualitative considerations.

Bridging: Process in which a design that has progressed beyond the concept definition stage is furnished as a requirements document in the Design-Build solicitation documents. The Design-Builder's role may, in the extreme case be limited to completion of construction documents and construction. See *Draw-Build*

Contractor: Under Design-Build, the party responsible for the construction of the project; often the lead party on the Design-Build Team.

Criteria Package: The facility program, design criteria, performance specifications and other project-specific technical information sufficient to provide the basis for best value proposals. The criteria package becomes part of the *Request for Proposals.*

Deliverables: The drawings, specifications commentary, models, etc., prepared by the proposer in response to a Request for Proposals. RFP deliverables are sometimes referred to as "submittal requirements" in RFPs and are not to be confused with contract deliverables.

Design-Builder: The entity contractually responsible for delivering the project design and construction. The Design-Builder can assume several organizational structures: a firm possessing both design and construction resources in-house (integrated firm), a joint venture between design professional and constructor, a constructor-led team with the design professional in a subcontract role, or a design professional-led team with the constructor in a subcontractor role.

Draw-Build: A variation of the Design-Build process in which an independent design professional develops design documentation to such an advanced stage (generally 30 to 35 percent) that the Design-Builder's design role is reduced to preparation of detailed working drawings and specifications. Price is typically the predominant, and sometimes only factor, in selection of the successful draw-builder.

Fast-Track Construction: Any process in which design and construction activities overlap. Design documents, equipment procurement and trade subcontracts are released incrementally or in phases.

Honorarium: A stated amount sometimes paid to unsuccessful proposers in consideration of preparing a Design-Build proposal. The honorarium is typically paid only to the most highly ranked unsuccessful proposers to prevent proposals being submitted simply to obtain an honorarium. Typically, with the honorarium, the data rights to the proposal documents are transferred to the Agency. Also know as *Stipend*.

Performance Specification: A specification expressed in terms of an expected outcome or acceptable performance standard. Often used in Design-Build to articulate the agency's requirements. Contrasts with *Prescriptive Specification,* also known as design specificiation.

Prequalification: The process in which an agency, based upon financial, management and other qualitative data, determines whether a firm is fundamentally qualified to compete for a certain project or class of projects.

Prescriptive of Design Specification: The traditional method of specifying materials or techniques found in Design-Bid-Build documents. The range of acceptable products, manufacturers, and techniques, to be adhered to by the builder is stipulated in detail. Prescriptive specifications are often used by a Design-Builder to contract with trade subcontractors and vendors.

Qualifications Submission: A written submission by interested Design-Build proposers, more generic and limited than a proposal, used by an agency for *prequalification* or *shortlisting*. Typically this will provide requested past experience information to document qualification requirements established by the Agency's RFQ.

Request for Proposals (RFP): The document issued by the agency that describes the procurement process, forms the basis for final proposals, and may become an element in the contract. The RFP consists of proposal requirements, contract requirements, program requirements, and performance requirements.

Request for Qualifications (RFQ): The document issued by the agency prior to an RFP that typically describes the project in enough detail to allow potential proposers to determine if they wish to compete and requests limited statements of qualification.. The RFQ forms the basis for selecting finalists in a two-phase or shortlisting process.

Shortlisting: Narrowing the field of proposers through the selection of the most qualified on the basis of qualifications. The number of shortlisted proposers invited to submit final proposals is most frequently between three and five. See *Request for Qualifications.*

Stipulated Sum/Best Design: A form of best value selection in which the contract price is established by the Agency and stated in the RFP. Typically, design proposals and management plans are evaluated and scored, with award going to the firm offering the best qualitative

Two-Phase Selection Process: A procurement process in which the first phase consists of shortlisting and the second phase consists of preparation and submission of complete Design-Build proposals from the shortlisted proposers. Also known as two-stage procurement.

Value Engineering: A procedure, integral to Design-Build, in which the Design-Builder, through an investment in additional architectural and engineering design, reduces prices or increases scope, or both, enhancing value by determining the most cost-effective means of achieving the Agency's objectives. Not to be confused with mere scope reduction to reduce cost. This is not the 'contractual' definition—under which VE must take place under the contract as a 'change' to contract

Weighted Selection Criteria Process: A form of best value selection in which maximum point values are pre-established for qualitative and price components, and award is based upon high total points earned by proposers from both components.

ATTACHMENT 3

EXCERPTS FROM OREGON REVISED STATUTES
(Through 2/21/02)

ORS 279.015. Competitive bidding; exceptions; exemptions.

* * *

(2) Subject to subsection (6)(b) of this section, the Director of the Oregon Department of Administrative Services local contract review board or, for contracts described in ORS 279.712 (2)(c), the Director of Transportation may exempt certain public contracts or classes of public contracts from the competitive bidding requirements of subsection (1) of this section upon approval of the following findings submitted by the public contracting agency seeking the exemption:

(a) It is unlikely that such exemption will encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts; and

(b) The awarding of public contracts pursuant to the exemption will result in substantial cost savings to the public contracting agency or, if the contracts are for public improvements described in ORS 279.712 (2)(c), to the agency or the public. In making such finding, the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board may consider the type, cost, amount of the contract, number of persons available to bid and such other factors as may be deemed appropriate.

(3)(a) Before final adoption of the findings required by subsection (2) of this section exempting a contract for a public improvement , or a class of contracts for public improvements described in ORS 279.712 (2)(c), from the requirement of competitive bidding, a public agency shall hold a public hearing.

(b) Notification of the public hearing shall be published in at least one trade newspaper of general statewide circulation a minimum of 14 days prior to the hearing.

(c) The notice shall state that the public hearing is for the purpose of taking comments on the agency's draft findings for an exemption from the competitive bidding requirement. At the time of the notice, copies of the draft findings shall be made available to the public. At the option of the public agency, the notice may describe the process by which the findings are finally adopted and may indicate the opportunity for any further public comment.

(d) At the public hearing, the public agency shall offer an opportunity for any interested party to appear and present comment.

(e) If a public agency is required to act promptly due to circumstances beyond its control that do not constitute an emergency, notification of the public hearing can be published simultaneously with the agency's solicitation of contractors for the alternative public contracting method, as long as responses to the solicitation are due at least five days after the meeting and approval of the findings.

* * *

(6) In granting exemptions pursuant to subsection (2)(a) and (b) of this section, the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board shall:

(a) Where appropriate, direct the use of alternate contracting and purchasing practices that take account of market realities and modern or innovative contracting and purchasing methods, which are also consistent with the public policy of encouraging competition.

(b) Require and approve or disapprove written findings by the public contracting agency that support the awarding of a particular public contract or a class of public contracts, without the competitive requirements of subsection (1) of this section. The findings must show that the exemption of a contract or class of contracts complies with the requirements of subsection (2)(a) and (b) of this section.

ORS 279.011. Definitions for ORS 279.005 to 279.111.

As used in ORS 279.005 to 279.111:

* * *

(5) "Findings" means the justification for an agency conclusion that includes, but is not limited to, information regarding:

(a) Operational, budget and financial data.

(b) Public benefits.

(c) Value engineering.

(d) Specialized expertise required.

(e) Public safety.

(f) Market conditions.

(g) Technical complexity.

(h) Funding sources.

ORS 279.103. Evaluation of certain public improvement projects not contracted by competitive bidding.

(1) Upon completion of and final payment for any public improvement contract, or class of contracts for public improvements described in ORS 279.712 (2)(c), in excess of $100,000 for which the public agency did not use the competitive bidding process, the public agency shall prepare and deliver to the Director of the Oregon Department of Administrative Services, the local contract review board or, for a class of contracts for public improvements described in ORS 279.712 (2)(c), the Director of Transportation an evaluation of the public improvement project or the class of contracts.

(2) The evaluation shall include but not be limited to the following matters:

(a) The actual project cost as compared with original project estimates.

(b) The amount of any guaranteed maximum price.

(c) The number of project change orders issued by the public agency.

(d) A narrative description of successes and failures during the design, engineering and construction of the project.

(e) An objective assessment of the use of the alternative contracting process as compared to the findings required by ORS 279.015.

(3) Evaluations required by this section shall be made available for public inspection.

(4) The evaluations required by this section must be completed within 30 days of the date that the public agency accepts:

(a) The public improvement project; or

(b) The last public improvement project if the project falls within a class of contracts for public improvements described in ORS 279.712 (2)(c).

Attachment 4

PUBLIC CONTRACTING COALITION MEMBERSHIP

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